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No. 06-116

IN THE

Supreme Court of the United States

DOUGLAS B. MOYLAN,
ATTORNEY GENERAL OF GUAM,

Petitioner,

v.

FELIX P. CAMACHO,
GOVERNOR OF GUAM,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GUAM

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the time for filing a petition for writ of certiorari from this Court was tolled while a petition for writ of certiorari or writ of certiorari with respect to the same judgment was pending before the United States Court of Appeals for the Ninth Circuit.

2. Whether the Supreme Court of Guam erred in interpreting the phrase "aggregate *tax* valuation" in the Guam Organic Act's debt-limitation provision, 48 U.S.C. § 1423a (emphasis added), as tying the limit on borrowing by the Guam territorial government to the full value of property on Guam rather than to the assessed value used for purposes of taxation.

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OPINIONS BELOW

The decision of the Supreme Court of Guam (Pet. App. 1a-35a) is unreported, but is available at 2003 WL 21697180. The order of the Court of Appeals for the Ninth Circuit granting petitioner's petition for a writ of certiorari (Pet. App. 37a) is unreported. The court of appeals' order dismissing the case for lack of jurisdiction in light of Congress's shifting of certiorari jurisdiction over decisions of the Guam Supreme Court to this Court (Pet. App. 39a) is unreported.

JURISDICTION

This Court has jurisdiction to review judgments of the Supreme Court of Guam pursuant to 28 U.S.C. § 1257 and 48 U.S.C. § 1424-2 (as amended in 2004). Pet. App. 48a. Petitioner's timely request for an extension of time within which to file a petition for a writ of certiorari was granted on May 31, 2006. The petition for a writ of certiorari was timely filed on July 19, 2006, and granted on September 26, 2006. *See infra* pp. 14-25.

STATUTORY PROVISIONS INVOLVED

Section 11 of the Organic Act of Guam states in pertinent part:

> [t]axes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and *when necessary to anticipate taxes and revenues*, bonds and other obligations may be issued by the government of Guam: *Provided, however*, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the *aggregate tax valuation* of the property in Guam. Bonds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be consid-

> ered public indebtedness of Guam within the meaning of this section.

48 U.S.C. § 1423a (first and third emphases added).

Section 22b of the Organic Act of Guam states:

> The relations between the courts established by the Constitution or laws of the United States and the local courts of Guam with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings.

48 U.S.C. § 1424-2.

Until amended by Congress in 2004, that section continued:

> *Provided*, That for the first fifteen years following the establishment of the appellate court authorized by section 1424-1(a) of this title, the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Judicial Council of the Ninth Circuit shall submit reports to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives at intervals of five years following the establishment of such appellate court as to whether it has developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States from all such final decisions. The United States Court of Appeals for the Ninth Circuit shall have jurisdiction to promulgate rules necessary to carry out the provisions of this subsection.

48 U.S.C. § 1424-2 (2000).

Section 2101(c) of Title 28 of the U.S. Code states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. § 2101(c).

Other relevant statutory provisions are set forth in the appendix to the petition for a writ of certiorari. Pet. App. 41a-65a.

INTRODUCTION AND STATEMENT OF THE CASE

This is a case about maintaining a limitation placed by Congress on the territorial government of Guam in order to ensure that it remains fiscally responsible and democratically accountable to its U.S. citizen electorate. Specifically, the case concerns a provision in the Organic Act of Guam, the federal statute that serves as that territory's constitution, which caps the amount of general obligation debt the government of Guam can assume at 10% of the "aggregate tax valuation" of property in the territory. Petitioner, the Attorney General of Guam, acting pursuant to his statutory duty to review the legality of all government contracts, has refused to approve bond issues that would push the territory's indebtedness above this limit, thereby subjecting future generations of Guam taxpayers to financial burdens that the legislative and executive branches are apparently unwilling to impose on current residents. In a decision that validated the excessive levels of borrowing sought by the territorial legislature and respondent Governor, the Supreme Court of Guam misinterpreted Guam's debt-limitation provision in contravention of both its clear text and undisputed purposes.

Petitioner has sought for more than three years to obtain appellate review by an Article III court of the Guam

Supreme Court's decision, which was an exercise of original jurisdiction based on only one week's briefing and two weeks of deliberation. At the time of the Guam Supreme Court's ruling, the Court of Appeals for the Ninth Circuit, not this Court, possessed exclusive jurisdiction to review judgments of the Guam Supreme Court by writ of certiorari. Petitioner's initial timely appeal to the Ninth Circuit was dismissed after full briefing and argument because the Ninth Circuit ultimately concluded that its jurisdiction had been eliminated by an intervening amendment to the Guam Organic Act. Petitioner then promptly filed a petition for writ of certiorari with this Court. Petitioner's timely certiorari petition to the Ninth Circuit and the Ninth Circuit's granting of that petition suspended the finality of the Guam Supreme Court's judgment and so should be treated as having tolled the running of the time period for filing certiorari petitions with this Court. A contrary determination would penalize petitioner for diligently following the avenues of appeal that were open to him and prevent review of the Guam Supreme Court's decision by any Article III court.

1. Overview Of The Guam Organic Act

Guam, an island of approximately 200 square miles located in the west central Pacific Ocean, is an unincorporated territory of the United States. Acquired by the United States in the Spanish-American War, the island was administered by the Navy from 1898 to 1950. *See Ngiraingas* v. *Sanchez*, 495 U.S. 182, 186 (1990). In 1950 Congress enacted the Organic Act of Guam, 48 U.S.C. §§ 1421 *et seq.*, which serves as Guam's constitution, *see* 48 U.S.C. § 1423a; *Haeuser* v. *Department of Law*, 97 F.3d 1152, 1156 (9th Cir. 1996). The Organic Act defines the structure and powers of Guam's territorial government and guarantees the people of Guam, who are U.S. citizens, the fundamental individual rights enshrined in the Bill of Rights. The Organic Act is designed to secure for the people of Guam the benefits of a democratically accountable local government constrained by the rule of law. *See* S. Rep. No. 81-2109, at 1-2 (1950).

The Governor of Guam is popularly elected to a four-year term. 48 U.S.C. § 1422. The Attorney General of Guam is also directly elected to a four-year term. 48 U.S.C. § 1421g(d)(2); 5 Guam Code Ann. § 30101(a). The Attorney General is the territory's chief legal officer and, unlike other executive officials, may not be removed from office by the Governor. 48 U.S.C. §§ 1422, 1421g(d)(1)-(2); 5 Guam Code Ann. §§ 30101(c), 3102. Guam law provides that the Governor may not execute any contracts on behalf of the territorial government without the Attorney General's approval of their legality. 5 Guam Code Ann. § 22601.

Section 11 of the Organic Act empowers the Guam Legislature to enact laws on "all rightful subjects of legislation" not inconsistent with the Organic Act or other federal laws applicable to Guam. 48 U.S.C. § 1423a. It then immediately limits the Guam Legislature's authority in one crucial respect: excessive borrowing. Section 11 specifically mandates that

> [t]axes and assessments on property, internal revenues, sales, license fees, and royalties for franchises, privileges, and concessions may be imposed for purposes of the government of Guam as may be uniformly provided by the Legislature of Guam, and *when necessary to anticipate taxes and revenues*, bonds and other obligations may be issued by the government of Guam: *Provided, however*, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the *aggregate tax valuation* of the property in Guam. Bonds or other obligations of the government of Guam payable solely from revenues derived from any public improvement or undertaking shall not be considered public indebtedness of Guam within the meaning of this section.

Id. (first and third emphases added).

While Congress strictly limited the amount of debt the territorial government can assume by linking the government's power to incur debt to anticipated taxes and reve-

nues, Congress left the Guam Legislature free to design the details of the territory's system for levying and collecting such taxes and revenues. Consequently, subject to the federal requirement of uniformity, local laws determine what types of property in Guam are taxed, how they are valued for taxation purposes, and what rates of taxation apply. In crafting the local tax structure, the Guam Legislature has opted to exempt certain types of real property from taxation, including government land, land used for educational or religious purposes, and land used in active farming. 11 Guam Code Ann. § 24401. The Department of Revenue and Taxation is required to appraise the taxable property on the island every three years, *id.* § 24306, and property is required to be appraised at its full market value, *id.* § 24102(f). The assessed or taxable value of real property subject to taxation is set at 35% of its appraised value. *Id.*

2. Origins Of The Present Dispute

For much of the 1990s, Guam's economy suffered a significant downturn. The territory's economy has long been driven principally by tourism (especially from Japan) and U.S. military spending. In the early 1990s, Japanese markets experienced massive declines, which significantly decreased Japanese investment and tourism in Guam. Military spending in Guam also declined. A series of other, unrelated events—a major earthquake in 1993, two supertyphoons in 1997 and 2002, the 1997 Asian economic crisis, the September 11, 2001, terrorist attacks, and the 2003 SARS epidemic—also contributed to the weakening of Guam's economy. *Cf.* JA 44a (Decl. of Felix P. Camacho in Support of Mot. to Expedite, ¶¶ 3-8). In combination, these events caused a substantial decline in the value of real property. One study, for example, calculates that the value of real property on Guam depreciated an average of 81% between 1990 and 2002. *See* W. Nicholas Captain, *Property Information: A Guam Case Study*, Real Estate Issues, Winter 2003, at 18.

In 2003 the Guam Legislature concluded that the territorial government had insufficient revenue in its General

Fund to pay certain obligations. Pet. App. 2a. On April 28, 2003, the Legislature passed Public Law 27-19, which authorized the Governor to issue bonds in an amount not to exceed $418,309,857. *Id.* The law earmarked $218,309,857 of the borrowing for General Fund expenditures, including tax refunds, utility payments to the Guam Power Authority, retirement fund payments, withholding payments, general fund vendor payables, and public school repairs. *Id.*; 5 Guam Code Ann. § 1512(a), (m). The law specified that the remaining $200 million in borrowed funds were to be used to pay the debt service on bonds issued a decade earlier. Pet. App. 2a.

Before the Governor could enter into any contracts to issue bonds pursuant to Public Law 27-19, he was required to obtain approval of the contracts' legality from petitioner Attorney General. 5 Guam Code Ann. § 22601. On May 14, 2003, petitioner sent a letter to the Governor and the Speaker of the Legislature indicating that he would not approve any contract to issue bonds pursuant to Public Law 27-19. Pet. App. 3a. Petitioner determined that the borrowing would be illegal on two grounds.

First, the new borrowing would bring the territorial government's indebtedness above the level permitted by the debt-limitation proviso in Section 11 of the Organic Act. Petitioner explained that the phrase "aggregate tax valuation" in the proviso should be understood to refer to the assessed value of property used for purposes of taxation (which at present is fixed by law at 35% of appraised value) rather than the full, appraised value. Petitioner's view accorded with the position adopted several years earlier by the Legislative Counsel, the Legislature's own internal legal adviser. Pet. App. 8a; 2 Guam Code Ann. § 1112 (providing for Legislative Counsel).

Second, even if the Legislature were to rely on appraised value, petitioner opined, it was improper for the Legislature to use the 2002 tax roll to determine that value. Guam law requires a reappraisal of property values every three years, *see* 11 Guam Code Ann. § 24306, but the gov-

ernment had not carried out an appraisal since 1993, *see* Pet. App. 3a. Petitioner acknowledged that the territory's Board of Equalization had made some adjustments to the tax rolls in each of the intervening years, but he noted that property values had declined significantly since 1993 because of the island's major economic downturn and that the 2002 tax roll did not fully reflect this depreciation.

After a further exchange of letters, the Legislature responded on June 25, 2003, by enacting Public Law 27-21 in a post-hoc attempt to validate its earlier action. Pet. App. 3a. Public Law 27-21 expressed the Legislature's view that the phrase "aggregate tax valuation" in the Organic Act's debt-limitation provision should be understood to mean "one hundred percent (100%) of the appraised value of the property on Guam." *Id.* Public Law 27-21 also provided that when the territorial government fails to conduct the triennial appraisals otherwise required by law, the "last completed" appraisal, regardless of how old, "as supplemented by the annual adjustments" by the Board of Equalization, shall be the appraisal used for purposes of taxation. *Id.* at 9a. Because the Legislature's expression of its view concerning the meaning of the Organic Act had no legal significance, *see id.* at 10a, petitioner continued to decline approval of any contracts needed to undertake the borrowing authorized under Public Law 27-19.

3. Litigation In The Supreme Court Of Guam

On July 1, 2003, the Governor filed an original declaratory judgment action in the Supreme Court of Guam pursuant to 7 Guam Code Ann. § 4104, which permits the Governor to seek a binding determination of a question of law affecting the operation of the executive branch that is "a matter of great public interest [when] the normal process of law would cause undue delay." *See also In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 WL 187459 (Guam Feb. 7, 2002). The members of the Guam Supreme Court are appointed by the Governor with the advice and consent of the Legislature and serve ten-year terms. 7 Guam Code

Ann. §§ 3103(a), 6101(a). At the time that the Governor filed the declaratory judgment action, the Guam Supreme Court was established only pursuant to territorial law, so it could be abolished by the act of the legislative and executive branches and did not constitute a "coequal branch of government." H.R. Rep. No. 108-638, at 2 (2004), *reprinted in* 2005 U.S.C.C.A.N. 2208, 2209.[1]

The Governor asked the supreme court to determine whether the borrowing authorized by Public Law 27-19 violated the Organic Act's debt-limitation provision and whether the use of a tax roll unmoored to a recent appraisal as a means of calculating the debt limit was permissible. Pet. App. 3a-4a. The supreme court promptly invited petitioner to intervene. The day after the action was filed, July 2, the court held a "status hearing" at which petitioner contended that determining the propriety of reliance on the 2002 tax roll would require factfinding that the court did not appear to be in a position to undertake. The court fixed an expedited briefing schedule. The parties were required to file their opening briefs in five days, on July 7, their opposition briefs the next day, and their reply briefs the day after that at 10:00 a.m. JA 3a. The court heard oral argument on July 9, the same day it received the reply briefs. JA 7a.

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[1] The Guam Legislature originally created a Guam Supreme Court in 1974, but this Court ruled that the local statute establishing the court violated the Organic Act. *See Territory of Guam* v. *Olsen*, 431 U.S. 195, 203-204 (1977). In 1984 Congress responded to *Olsen* by amending the Organic Act to authorize the Guam Legislature to establish the Guam Supreme Court. 48 U.S.C. § 1424-1 (1984). The Guam legislature did not exercise the authority until 1992, however, and the Guam Supreme Court did not become functional until 1995. *See Haeuser* v. *Department of Law*, 368 F.3d 1091, 1094 n.5 (9th Cir. 2004); H.R. Rep. No. 107-584, at 3 (2002). In 2004 Congress itself authorized the Guam Supreme Court directly in the Organic Act in order to ensure its independence from the territorial government's political branches. In the same enactment, Congress provided for direct review of the Guam Supreme Court's decisions by this Court rather than by the Court of Appeals for the Ninth Circuit. *See* 48 U.S.C. §§ 1424-1, -2 (as amended 2004); *see also infra* pp. 12, 15 (discussing the change in appellate jurisdiction).

The supreme court issued its decision on July 23, concluding that the bonds authorized under Public Law 27-19 did not violate the Organic Act's debt-limitation provision. Pet. App. 2a. The court interpreted the phrase "aggregate tax valuation" as referring to full, appraised value rather than the assessed value used for purposes of taxation. Using as a starting point the fact that a similar debt-limitation provision in the Virgin Islands Organic Act used the phrase "aggregate assessed valuation" rather than "aggregate tax valuation," the court reasoned that if Congress had intended to refer to assessed value in the Guam Organic Act, it would have used the word "assessed" rather than "tax." *Id.* at 12a. Because the Organic Act did not require the Guam Legislature to limit the levy of property taxes to a certain percentage of actual or market value, the court took the view that "tax valuation" should be interpreted consistently with the "maximum grant of power to tax allowed by Congress." *Id.* at 15a. Accordingly, it concluded that "tax valuation" must mean "appraised value" because "all taxes on property must necessarily be based, in the first instance, upon appraised values of the property." *Id.* at 14a. The court never explained how this interpretation could be squared with its acknowledgment elsewhere in the opinion that tax-exempt property was valued in the appraisal process as well. *Id.* at 34a.

The court then considered the definition of "property" upon which the debt limitation is to be calculated under the Organic Act. Pet. App. 15a-19a. Despite having held that the debt-limit calculations should include the portion of market value that is exempted from tax assessment under current Guam law, the court nonetheless rejected respondent Governor's position that "property" includes property that is entirely exempt from taxation. *Id.* at 18a-19a. It would be unwise to calculate the debt limit based on non-taxed property, the court explained, because this property does not generate tax revenue. *Id.* The court acknowledged that its reasoning in interpreting the word "property" might be thought to be inconsistent with its analysis of the meaning of the phrase "aggregate tax valuation." *Id.* at 18a n.9.

The court next concluded that the government could use the 2002 tax roll to calculate the current debt limit, even though the government had not conducted the triennial appraisals mandated by Guam law to create the tax roll. Pet. App. 19a-26a. The court acknowledged that the territorial legislature's post-hoc effort in Public Law 27-21 to relax the triennial appraisal requirement by allowing reliance on tax rolls could have only prospective effect and so could not be used to support the legality of borrowing authorized before its enactment. *Id.* at 21a-22a. But the court nonetheless held that reliance on the 2002 tax roll was proper. The court determined that Guam law mandates triennial appraisals only for purposes of taxation, not for purposes of calculating the debt limit. *Id.* at 22a. The court placed the burden on petitioner to demonstrate that the system used to calculate the values in the tax roll through individual adjustments to the 1993 appraisal levels was arbitrary or capricious and found that petitioner had failed to carry that burden in the one week he had been given to present materials to the court. *Id.* at 25a-26a.

Finally, the court applied its interpretation of the meaning of the debt-limitation proviso to the particular facts of the 2003 borrowing bill and Guam's existing debts. According to the 2002 tax roll, the court found, the total appraised value of taxable property on Guam was $11.1493 billion. Pet. App. 34a. That meant the debt cap stood at $1.11493 billion. *Id.* The court found that the territorial government's existing "public indebtedness" was $378 million. *Id.* On this view, adding the $418,309,857 of debt authorized by Public Law 27-19 would bring the territory's debt to just below $800 million, well within the court's interpretation of the cap. *Id.* at 34a-35a.

Relying on the figures from the 2002 tax roll, petitioner's interpretation of the debt-limitation proviso would have meant a debt cap of $390.3 million, 35% of the $1.11493 billion ceiling calculated by the court. Thus, accepting the court's determination of existing public indebtedness at $378 million, some of the very first bonds issued under authoriza-

tion in Public Law 27-19 would have pushed the territorial government's indebtedness above the congressionally mandated limit.

4. Appellate Proceedings

Petitioner promptly sought review of the Guam Supreme Court's decision before the Court of Appeals for the Ninth Circuit, which at the time possessed jurisdiction to review Guam Supreme Court decisions by writ of certiorari. 48 U.S.C. § 1424-2 (2000) (Pet. App. 47a-48a). The Ninth Circuit granted the petition. Pet. App. 37a. In addition to questioning the Guam Supreme Court's definition of "aggregate tax valuation" in the Organic Act's debt-limitation provision, petitioner challenged the expedited process used by the Guam Supreme Court and its resort to factfinding. The parties submitted full briefing, and the court heard oral argument on May 6, 2004. JA 13a.

In October 2004 Congress amended 48 U.S.C. § 1424-2, to establish the Guam Supreme Court directly under the Organic Act and to shift certiorari jurisdiction over its decisions from the Ninth Circuit to this Court. Act of Oct. 30, 2004, Pub. L. No. 108-378, §§ 1-2, 118 Stat. 2206, 2208. But the Ninth Circuit only concluded that the amendment regarding appellate jurisdiction applied to pending cases in January 2006, *see Santos* v. *People of Guam*, 436 F.3d 1051 (9th Cir. 2006), and only dismissed the appeal in this case for lack of jurisdiction on that ground on March 6, 2006, Pet. App. 39a.

On May 24, 2006, petitioner requested an extension of time within which to file a petition for certiorari with this Court, which Justice Kennedy granted on May 31. The petition for a writ of certiorari was timely filed on July 19, 2006, and granted on September 26, 2006.

SUMMARY OF ARGUMENT

Petitioner has sought for more than three years to obtain appellate review by an Article III court of the Guam Supreme Court's decision. At the time of the Guam Supreme Court's ruling, the Court of Appeals for the Ninth

Circuit, not this Court, possessed exclusive jurisdiction to review judgments of the Guam Supreme Court by writ of certiorari. Petitioner's initial timely appeal to the Ninth Circuit was dismissed after full briefing and argument because the Ninth Circuit ultimately concluded that its jurisdiction had been eliminated by an intervening amendment to the Guam Organic Act. Petitioner then promptly filed a petition for writ of certiorari with this Court. Petitioner's timely certiorari petition to the Ninth Circuit and the Ninth Circuit's granting of that petition should be treated as having tolled the running of the time period for filing certiorari petitions with this Court because they effectively suspended the finality of the Guam Supreme Court's judgment. A contrary determination would penalize petitioner for diligently pursuing the avenues of appeal that were open to him and prevent review of the Guam Supreme Court's decision by any Article III court.

The Guam Supreme Court's decision should be reversed as contrary to the plain language and undisputed purposes of the Organic Act's debt-limitation provision. First, the Guam Supreme Court's equation of "aggregate tax valuation" with actual market value defies the plain language of the debt-limitation provision, which links the cap to anticipated revenues and tax receipts and to the assessed value of property used for taxation purposes. The court also misconstrued the significance of a similar debt-limitation provision in federal statutes concerning the Virgin Islands. Second, the court's holding thwarts the undisputed congressional purpose behind both debt-limitation provisions, which is "to benefit the taxpayer by restraining the government's propensity to incur debts and to saddle future generations of taxpayers with those debts." *Guam Tel. Auth.* v. *Rivera*, 416 F. Supp. 283, 287 (D. Guam 1976).

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI FROM THIS COURT WAS TIMELY FILED BECAUSE THE 90-DAY PERIOD FOR SEEKING REVIEW BY THIS COURT DID NOT BEGIN TO RUN UNTIL THE COURT OF APPEALS DISMISSED THE CASE

This Court has long recognized that the start of the 90-day period for filing a petition for writ of certiorari provided in 28 U.S.C. § 2101(c) is tolled if the petitioner or a court below takes an action that "raise[s] the question whether the court will modify the judgment and alter the parties' rights." *Hibbs* v. *Winn*, 542 U.S. 88, 98 (2004). Here, petitioner's timely filing of a certiorari petition with the court of appeals and that court's grant of certiorari had the effect of "'suspend[ing] the finality of the [Guam Supreme Court's] judgment, pending [the court of appeals'] further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.'" *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990) (quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942)). Thus, petitioner's filing of a certiorari petition with the court of appeals and the court of appeals' granting of the petition should be treated as having the same effect that the filing of a petition for rehearing has on a decision of a court of appeals, namely of "suspend[ing]" the underlying judgment now sought to be reviewed. *Jenkins*, 495 U.S. at 46; *cf. Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203, 205-206 (1943); *Pink*, 317 U.S. at 266. While the court of appeals, having properly granted certiorari, considered the case, "there [was] no 'judgment' to be reviewed" by this Court, *Jenkins*, 495 U.S. at 46, and the 90-day period established by 28 U.S.C. § 2101(c) should be considered to have been tolled.

A. This Court Lacked Jurisdiction To Review The Guam Supreme Court's Judgment When It Was Issued, When Petitioner Sought Certiorari Review By the Ninth Circuit, And When The Ninth Circuit Granted Review

The Supreme Court of Guam handed down its decision on July 23, 2003. At that time, the Guam Organic Act provided that "the United States Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had." 48 U.S.C. § 1424-2 (2000). Petitioner timely filed a petition for a writ of certiorari with the Ninth Circuit on August 1, 2003, JA 11a, and the petition was granted on October 23, 2003, *id.*; Pet. App. 37a. Congress amended the Organic Act of Guam to give this Court rather than the Ninth Circuit direct review over Guam Supreme Court decisions on October 30, 2004. Pub. L. No. 108-378, § 2, 118 Stat. at 2208. But the writ of certiorari issued by the Ninth Circuit remained pending before that court until it determined that the amendment of the Organic Act applied to cases pending on its date of enactment, *see Santos* v. *People of Guam*, 436 F.3d 1051 (9th Cir. 2006), and so dismissed the appeal in this case for lack of jurisdiction on March 6, 2006. Thus, when the Guam Supreme Court issued its judgment, when petitioner sought a writ of certiorari from the Ninth Circuit, and when the Ninth Circuit granted the writ, the Ninth Circuit, not this Court, possessed exclusive jurisdiction to directly review decisions of the Guam Supreme Court. 48 U.S.C. § 1424-2 (2000); *see White* v. *Klitzkie*, 281 F.3d 920, 925 (9th Cir. 2002).

B. Petitioner's Filing Of A Certiorari Petition With The Ninth Circuit And The Ninth Circuit's Granting Of The Writ Suspended The Finality Of The Guam Supreme Court's Judgment And Thus Tolled The Limitations Period Under 28 U.S.C. § 2101(c)

The time for filing a petition for a writ of certiorari from this Court in a civil case is established by 28 U.S.C. § 2101(c),

which provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree," unless a Justice extends the deadline for up to sixty days "for good cause shown." As it has with respect to the other filing time limits enumerated in Section 2101, the Court has described Section 2101(c)'s deadline as "mandatory and jurisdictional," such that the Court has "no authority to extend the period for filing except as Congress permits." *Jenkins*, 495 U.S. at 45.[2]

This Court has long held, however, that actions that "'suspend the finality of the [lower court's] judgment,'" *Jenkins*, 495 U.S. at 46 (quoting *Pink*, 317 U.S. at 266), toll the running of the 90-day period. They do so because they "raise the question whether the court will modify the judgment and alter the parties' rights." *Hibbs*, 542 U.S. at 98. Because petitioner's filing of a petition for a writ of certiorari with the Ninth Circuit and the Ninth Circuit's grant of the petition raised exactly that question concerning petitioner's and respondent's rights, as determined by the Guam Supreme Court, those actions should be treated as tolling the 90-day period as well.

The post-judgment actions this Court has recognized as tolling the running of the 90-day period established in Section 2101(c) include: (i) a party's timely filing of a petition for rehearing or motion for reconsideration by the court or agency that issued the judgment or order that would be subject to review, *see, e.g.*, *Jenkins*, 495 U.S. at 47, 49; *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 209-

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[2] This Court's Rule 13.1 also provides that "[u]nless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment," but such rules are not jurisdictional. Rather, where such "court-created rules fail to anticipate unusual circumstances that fit securely within a federal statute's compass, the statute controls our decision." *Hibbs* v. *Winn*, 542 U.S. 88, 99 (2004).

210 (1952); *Pink*, 317 U.S. at 266; *Citizen's Bank* v. *Opperman*, 249 U.S. 448, 450 (1919) (predecessor of 28 U.S.C. § 2101(c)); *see also United States* v. *Healy*, 376 U.S. 75, 77-79 (1964) (criminal case; collecting earlier decisions from both criminal and civil cases); (ii) a lower court's appropriate decision to consider a late-filed rehearing petition, *Young* v. *Harper*, 520 U.S. 143, 147 n.1 (1997); and (iii) a lower court's *sua sponte* order recalling its mandate and directing the parties to brief whether the case should be reheard en banc, *Hibbs*, 542 U.S. at 97.[3] The Court has adopted the same rules in applying the parallel statutory sections in 28 U.S.C. § 2101(a) and (b) that set the time limits for seeking review by this Court of other particular types of judgments, time limits that the Court also considers jurisdictional. *See, e.g.*, *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 445-46 (1974) (running of 28 U.S.C. § 2101(b) period tolled by timely rehearing petition); *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 373 n.10 (1984) (running of 28 U.S.C. § 2101(a) period would be tolled by timely motion for reconsideration of merits). Indeed, the Court has even held that where a party files a motion for a partial new trial, the start of the Section 2101 period is tolled with regard to issues not covered by the motion. *See Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 150 (1980) (28 U.S.C. § 2101(b)). In cases concerning the 30-day time limit for filing notices of appeal for review in the courts of appeals fixed in 28 U.S.C. § 2107, which likewise has been held to be jurisdictional, *see, e.g.*, *Browder* v. *Director*, 434 U.S. 257, 264 (1978), the Court has adopted the same approach. *See Leishman*, 318 U.S. at 205 (motion to amend; predecessor of 28 U.S.C. § 2107); *Zimmern* v. *United States*, 298 U.S. 167, 169-70 (1936) (district court's *sua sponte* order

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[3] This Court's Rule 13.3 similarly provides that the running of the period to file a petition for writ of certiorari is tolled "if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing."

announcing intent to modify or amend its decree; predecessor of 28 U.S.C. § 2107); *Kingman* v. *Western Mfg. Co.*, 170 U.S. 675, 678, 680 (1898) (period tolled by filing of timely rehearing petition; predecessor of 28 U.S.C. § 2107); *Aspen Mining & Smelting Co.* v. *Billings*, 150 U.S. 31, 36-37 (1893) (same).[4]

While the actions suspending the finality of the judgment sought to be reviewed here are a petition seeking review of that judgment by a higher court and acceptance of review by the higher court rather than a petition for rehearing or similar action involving the court whose judgment is sought to be reviewed, the same principles should apply. In both circumstances, by the petitioner's action and the court's response, "[t]he final judgment already rendered was . . . challenged." *Pink*, 317 U.S. at 266. The finality of the Guam Supreme Court's judgment was therefore suspended because the filing of the petition for a writ of certiorari with the Ninth Circuit and the Ninth Circuit's granting of the petition opened the prospect that the "legal rights and obligations . . . settled" in the Guam Supreme Court's decision would be "disturbed or revised." *Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 212. Because the Guam Supreme Court's judgment had been "deprived . . . of that finality which is essential to appealability," *Leishman*, 318 U.S. at 205, "there [was] no 'judgment' to be reviewed" by this Court, *Jenkins*, 495 U.S. at 46.

The situation presented here is analogous to cases in which an appellant or petitioner has sought discretionary review by a state high court before petitioning this Court for review of a substantial federal question. Because exhaustion is required before this Court's jurisdiction vests, this Court

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[4] For application of the same principle with regard to other filing deadlines, see, *e.g.*, *Bowman* v. *Lopereno*, 311 U.S. 262 (1940) (adjudication of untimely petition for rehearing tolls 30-day period for appeals in bankruptcy, 11 U.S.C. 48(a) (1934)); *United States* v. *Ellicott*, 223 U.S. 524 (1912) (filing of new trial motion tolls 90-day filing period for appeals from Court of Claims).

has recognized that the period for filing a petition does not begin to run until the state high court declines to exercise review or grants review and hands down its own judgment. In the context of statutes expanding or changing the character of this Court's jurisdiction in particular, the Court has followed the principle that a decision below only becomes final for purposes of triggering the limitations period for review by this Court once any discretionary review by lower courts has been completed. In *Andrews* v. *Virginian Railway Co.*, 248 U.S. 272 (1919), for example, this Court had to determine the effect of the 1916 statute that shifted the mode of this Court's jurisdiction to review certain judgments of state courts from writ of error to writ of certiorari (and that established a three-month filing limit for all petitions). The judgment of the trial court sought to be reviewed was handed down shortly before the jurisdiction-shifting statute took effect. But the order of the intermediate appellate court refusing discretionary review issued only after the statute had made certiorari review the only avenue for review by this Court. Because the losing plaintiff had sought review by writ of error, not certiorari, this Court dismissed the writ for want of jurisdiction, reasoning that "[u]ndoubtedly, before the action of the Court of Appeals, the judgment was not final and was susceptible of being reviewed and reversed by that court." *Id.* at 275.

The Court acknowledged that the intermediate appellate court's power of review (like the Ninth Circuit's here) was discretionary. But that did not affect the determination of finality for purposes of the time limits on this Court's review:

> It is true that under the law of Virginia, in a case like this the power of the Court of Appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date,

> or became so only from the date of the happening of the condition—the action of the Court of Appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court.

248 U.S. at 275; *see Chicago Great W. R.R. Co.* v. *Basham*, 249 U.S. 164, 166-167 (1919) (state supreme court's consideration of second rehearing motion delayed finality until after jurisdiction-shifting statute took effect).

The suspending effect on the finality of the Guam Supreme Court's judgment of petitioner's Ninth Circuit petition and of the granting of that petition becomes particularly clear when one considers that, at the time the petition was filed and granted, the Ninth Circuit's power of discretionary review over Guam Supreme Court decisions resembled the power of discretionary review typically exercised by state supreme courts over state intermediate appellate courts. Like a state supreme court, the Ninth Circuit possessed the authority to review questions of local law as well as federal law. *See Gutierrez* v. *Pangelinan*, 276 F.3d 539, 546 (9th Cir. 2002); *EIE Guam Corp.* v. *Supreme Court of Guam*, 191 F.3d 1123, 1125 (9th Cir. 1999).[5] And like the judgments of a state supreme court reviewing decisions by a lower state court, the Ninth Circuit's judgments reviewing Guam Supreme Court decisions were subject to further review by this Court. This Court twice declined to exercise such jurisdiction. *See Gutierrez*, 276 F.3d 539 (9th Cir.), *cert. denied* 537 U.S. 825 (2002); *EIE Guam Corp.*, 191 F.3d 1123 (9th Cir. 1999), *cert. denied*, 528 U.S. 1137 (2000). The analogy between the Ninth Circuit's role and a state high court's is particularly apt in this case because the Guam Supreme

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[5] Indeed, Congress provided for Ninth Circuit review for up to 15 years after the creation of the Guam Supreme Court because it believed that "during the formative years of the new appellate court and while it establishes its institutional traditions, all decisions of that court should be reviewable by a court of appeals which is familiar with the local conditions." 130 Cong. Rec. 23790 (Aug. 10, 1984) (Sen. Weicker).

Court served as the court of first instance rather than an appellate court.

In the context of reviewing decisions from state courts subject to discretionary review by higher state courts, this Court has made clear that only once that discretionary review has been completed does the judgment below become final for purposes of determining the time limits for review by this Court. In *American Railway Express Co.* v. *Levee*, 263 U.S. 19 (1923), for instance, the Louisiana Supreme Court had declined to exercise its discretionary jurisdiction to issue a writ of certiorari to review a decision by the Louisiana Court of Appeals. The respondent challenged this Court's jurisdiction because the petition sought a writ of certiorari to the court of appeals rather than to the state supreme court. This Court rejected the challenge, noting that "although it was necessary for the petitioner to invoke [the Louisiana Supreme Court's] jurisdiction in order to make it certain that the case could go no farther, when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had." *Id.* at 20-21 (citation omitted). Nonetheless, the Court observed, "the limit of time for applying to this Court was from the date when the writ of certiorari was refused." *Id.* at 21; *see also Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954); *Cole* v. *Violette*, 319 U.S. 581, 582 (1943) (per curiam); *Mellon* v. *O'Neill*, 275 U.S. 212, 213 (1927); *Bacon* v. *Texas*, 163 U.S. 207, 215 (1896); *Fisher* v. *Carrico*, 122 U.S. 522, 525-526 (1887).

Just as this Court has treated discretionary review by a higher state court as suspending the finality of a lower court's decision for purposes of this Court's review of the underlying judgment, so here the exercise of discretionary review by the Ninth Circuit should be accorded the same finality-suspending effect.

C. The Ninth Circuit Properly Retained The Case To Determine Its Jurisdiction After The Organic Act Was Amended In 2004

When Congress amended the Organic Act in October 2004, petitioner's timely-sought appeal to the court of appeals had already been fully briefed and argued. *See* JA 13a. The Ninth Circuit acted properly in retaining jurisdiction to determine its own jurisdiction. *See, e.g.*, *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2155 (2006) ("A federal court 'necessarily ha[s] jurisdiction to decide whether the case [is] properly before it'" (citation omitted)); *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) ("[I]t is familiar law that a federal court always has jurisdiction to determine its own jurisdiction."). It was only the Ninth Circuit's ultimate dismissal for lack of jurisdiction that determined that petitioner was no longer required to pursue his pending appeal before that court. That dismissal therefore rendered the Guam Supreme Court's judgment final for purposes of review by this Court and triggered the running of Section 2101(c)'s 90-day period for seeking certiorari review by this Court.[6]

D. Additional Considerations Also Support Interpreting Section 2101(c) As Permitting This Court To Exercise Jurisdiction

Three further considerations strongly support the conclusion that Congress intended this case to be subject to the Court's review.

First, this Court has recognized a presumption that Congress intends decisions of territorial courts to be subject to review by at least one Article III court. In *Territory of Guam* v. *Olsen*, 431 U.S. 195 (1977), the Court noted that "Congress has consistently provided for appellate review by Art. III courts of decisions of local courts of the other Terri-

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[6] Even if this Court is dissatisfied with the long time the Ninth Circuit took in resolving the jurisdictional issue and dismissing the case, the finality of the Guam Supreme Court's decision remained suspended during the pendency of the Ninth Circuit's review.

tories. What history there is points to a purpose to create a similar system for Guam." *Id.* at 203-204 (footnote omitted). Without a "clear signal from Congress . . . that it intended to allow . . . foreclos[ure] [of] appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law," *id.* at 202, this Court was "unwilling to say that Congress made an extraordinary exception in the case of Guam," *id.* at 204. Moreover, the Court noted, "we should hesitate to attribute such a purpose to Congress since a construction that denied Guam litigants access to Art. III courts for appellate review of local-court decisions might present constitutional questions." *Id.* The presumption that Congress intends territorial court decisions to be subject to review by Article III courts bolsters the conclusion that, when it amended the Guam Organic Act in 2004, Congress did not intend pending appeals to slip through the cracks and escape Article III review altogether.

Second, interpreting Section 2101(c) to bar the petition would deprive petitioner of access not only to an Article III court, but to *any* structurally independent court. When the Guam Supreme Court issued its decision, it did not constitute a fully independent and coequal branch of the Guam government because, unlike the territorial legislature and the executive branch, it had been established only pursuant to local statute, not federal law. Indeed, the Guam Legislature had attempted to interfere with the court's jurisdiction so frequently that the author of the Guam Supreme Court opinion in this case testified before Congress that "our island's judicial branch is marked not by independence but rather by political influence." *H.R. 521 & H.R. 791 Legislative Hearing Before the H. Comm. on Resources*, 107th Cong. 59 (2002) (statement of Acting Chief Justice F. Philip Carbullido).[7] Congress corrected this structural defect in

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[7] *See also* H.R. Rep. No. 107-584, at 9 (2002) (recounting various attempts by the Guam Legislature to interfere with the Guam Supreme Court's jurisdiction); 150 Cong. Rec. H7027 (Sept. 13, 2004) (Del. Bordallo

the same 2004 amendment of the Organic Act that switched jurisdiction over appeals from the Guam Supreme Court from the Ninth Circuit to this Court. Thus, given the Guam Supreme Court's lack of structural independence at the time it rendered the judgment sought to be reviewed, it is particularly important to give weight to the presumption in favor of Article III review this Court recognized nearly 30 years ago in *Olsen*.

Third, a rule that makes the petition untimely would create "a procedural pitfall, devoid of any sound supporting rationale," by penalizing petitioner for timely seeking appellate review in accordance with the Organic Act and for failing to "file a redundant slip of paper" with this Court (*i.e.*, a protective petition for writ of certiorari that would almost certainly have been dismissed as improper in light of 48 U.S.C § 1424-2). *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 150. Indeed, such a rule would create substantial uncertainty for litigants, thereby encouraging redundant and unnecessary protective filings that would pointlessly increase the workload for both parties and the Court. *Cf. Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 515 (1967) (statute of limitations on claims against the United States in 28 U.S.C. § 2401(a) does not mandate the filing of suit prior to administrative exhaustion because "protective suit[s] would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts").

In short, there is no principled basis for denying the applicability of the rule of *Hibbs*, *Jenkins*, and this Court's long line of decisions concerning finality of state-court judgments subject to discretionary review to the admittedly idiosyncratic circumstances of this case. Petitioner at every turn sought review of the Guam Supreme Court's decision in a

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of Guam) ("[T]he current judicial structure . . . can be subject to manipulations based upon shifts in control of Guam's executive and legislative branches," since "the Guam legislature and the Guam executive branch have the power to abolish the Supreme Court of Guam . . . .").

timely manner, first by petitioning the court of appeals successfully and then by promptly filing a petition with this Court once the court of appeals dismissed the writ of certiorari it had previously granted to review the decision of the Guam Supreme Court. Neither 28 U.S.C. § 2101(c) nor common sense requires anything more.

II. THE GUAM SUPREME COURT'S DECISION UNDERMINES A CONGRESSIONALLY MANDATED RESTRICTION ON THE POWERS OF THE GUAM GOVERNMENT

The Guam Supreme Court's interpretation of the Organic Act's debt-limitation provision ignores the statute's plain language, misconstrues the significance of another territory's debt-limitation statute, and disregards Congress's central purpose of ensuring that Guam's territorial legislature and Governor remain democratically accountable for their fiscal policy decisions.

A. The Guam Supreme Court's Interpretation Conflicts With The Wording Of The Guam Organic Act

Interpretation of the debt-limitation provision must begin with the words of the provision themselves. *See, e.g., Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The Guam Organic Act states that "when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by the government of Guam: *Provided, however*, That no public indebtedness of Guam shall be authorized or allowed in excess of 10 per centum of the aggregate tax valuation of the property in Guam." 48 U.S.C. § 1423a.

Two features of this language are particularly important. First, public indebtedness may only be issued "when necessary to anticipate taxes and revenues." Thus, borrowing by the Guam Legislature is permissible only when the Legislature determines that the debt incurred can be retired from existing or reasonably anticipatable sources of tax revenue. *See, e.g., Hodges* v. *Crowley*, 57 N.E. 889, 892 (Ill. 1900); *cf. Wein* v. *State*, 347 N.E.2d 586, 591 (N.Y. 1976).

Second, the cap on overall indebtedness is set at 10% of the "aggregate *tax* valuation of the property" in the territory (emphasis added). Thus, although the Organic Act does not mandate a particular method of valuation—*i.e.*, whether taxes be levied on the full market value or on some lesser assessment value—this language again limits debts to those payable from existing resources, as determined by existing tax valuation requirements and methodologies.

Yet the Guam Supreme Court, by interpreting "aggregate tax valuation" to mean full market value, read the crucial modifier "tax" out of the debt-limitation provision. This not only severed the statutory link to anticipation of revenue and tax collections under the existing tax valuation structure, but also violated the well-established canon that whenever possible, courts must "construe a statute to give every word some operative effect." *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). If Congress had intended the debt ceiling to be permanently and categorically tied to the full value of all property on Guam, it could simply have used the term "aggregate valuation," or even more simply, "aggregate value." Instead, Congress used the term "*tax* valuation," with the evident purpose of tying the level of permissible indebtedness to the valuation of property used for purposes of taxation—however that tax valuation system is structured by local officials. *Cf. Duncan* v. *Walker*, 533 U.S. 167, 169, 174-175 (2001) (holding that a statute referring to "State post-conviction or other collateral review" did not apply to federal habeas corpus review because reading the statute otherwise would render the modifying term "State" insignificant and thus fail to fulfill the Court's duty "to give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)).

As Congress would certainly have been aware, many jurisdictions set the value of property for purposes of taxation

considerably below the full market value.[8] That pattern was predictably followed in Guam itself. *See* 11 Guam Code Ann. § 24102(f) (defining "value" of real property for purposes of taxation as 35% of appraised value). Where a separate assessment level is set at something less than full market value, linking the permissible level of public indebtedness to the value of property used for imposing taxes has the clear effect of keeping the territorial government's borrowing in line with its ability and willingness to repay the debt through current and expected tax revenues.

The Guam Supreme Court's error is thrown into relief by state supreme court decisions interpreting debt-limitation provisions lacking a qualifier such as "tax" or "assessed" before the word "value" or "valuation." In construing these unqualified debt-limitation clauses, several state high courts have taken the absence of a qualifying adjective as a clear indication that full market value was intended. In *Board of Education* v. *Passey*, 246 P.2d 1078 (Utah 1952), for example, the Utah Supreme Court interpreted a constitutional debt ceiling that limited municipal borrowing to 4% of "'the value of the taxable property therein, the value to be ascertained by the last assessment for State and County purposes, previous to the incurring of such indebtedness,'" *id.* at 1078 (citation omitted), where the state legislature had set the assessment rate at 40% of market value. The defendant school board clerk refused to sign bonds issued by the board, claiming that the amount of the bond issue exceeded 4% of the assessed value of the property in the municipality. The Utah Supreme Court rejected the clerk's view, reasoning that in the constitutional debt cap "[t]he word 'value' is not limited or qualified by any adjectives. It does not read 'assessed value' or specify any other particular kind of value. The word 'value' standing by itself can have only one meaning, viz. the full worth or actual value—not a fractional share

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[8] *See, e.g.*, Colo. Const. art. 10, § 3(b) (residential real property shall be valued for assessment at 21% of actual value); La. Const. art. 7, § 18(B) (setting assessed value at 10% of fair market value for land).

thereof." *Id.* at 1079. Other courts have followed the same sensible logic. *See N.W. Halsey & Co.* v. *City of Belle Plaine*, 104 N.W. 494, 495-497 (Iowa 1905); *State ex rel. Calles* v. *Board of Comm'rs*, 185 P. 456, 457 (Mont. 1919); *Hansen* v. *City of Hoquiam*, 163 P. 391, 392 (Wash. 1917); *see also C. B. Nash Co.* v. *City of Council Bluffs*, 174 F. 182, 184-185 (S.D. Iowa 1909).

Just as the absence of a qualifier before "valuation" indicates legislative intent to tie a debt restriction to market value, the presence of a qualifier such as "tax" (or "assessed") shows a legislative intent that the debt limit be tied to the value used for purposes of taxation, *i.e.*, the assessment value where state or territorial law provides that taxes may only be assessed on some fraction of market value. *Cf.*, *e.g.*, *Johanson* v. *Independent Sch. Dist. No. 23*, 73 N.W.2d 126, 129 (Minn. 1955) ("It is significant that the legislature saw fit to use the words 'in determining the assessed value.' It did not say 'in determining value' . . . .").

The suggestion that the Guam Supreme Court's opinion is saved because it construes the word "tax" to limit the types of property upon whose value the debt limit was to be calculated cannot survive scrutiny. *See* Pet. App. 17a-19a. If Congress had intended the word "tax" to qualify the meaning of "property" rather than defining the kind of valuation from which the debt limitation must be calculated, it could easily have made its intention clear by placing "taxable" before "property" rather than "tax" before "valuation." The use of the term "taxable property" in that way is common enough in state constitutional debt caps[9] and in fact appears in the Virgin Islands' debt-limitation provision enacted by Congress just a year before the Guam Organic Act. *See* 48 U.S.C. § 1403 (limiting that territory's indebtedness to 10% of the "aggregate assessed valuation of the taxable real

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[9] *See, e.g.*, Ga. Const. of 1983, art. IX, § V, ¶ I(a) ("The debt incurred by any . . . political subdivision of this state . . . shall never exceed 10 percent of the assessed value of all taxable property within such . . . subdivision . . . ."); Wyo. Const. of 1889, art. 16, § 5 (same).

property"). Although the Guam Supreme Court concluded that other wording differences between the two statutes were highly significant reflections of congressional intent, Pet. App. 12a (emphasizing the difference between "assessed" and "tax" valuation), it offered no explanation (or legislative history evidence) to support its overlooking of this difference or for the roundabout locution its interpretation would attribute to the Guam Organic Act's drafters.

Moreover, the court's reasoning that "it is imprudent to base the debt limit on non-taxed property because such property is not revenue generating" only underscores the problems with its interpretation of "tax valuation" to mean market value. Pet. App. 18a. Under the valuation system enacted by the Guam Legislature, some properties are entirely exempt from taxation and some properties are partially exempt in that taxes are not levied on 65% of their value. Either way, without direct legislative action to change the status quo, the exempted portions of the property "do[] not contribute to the general revenue of the government, and thus should not be used to determine the debt limit" under the Guam Supreme Court's own logic. *Id.* Indeed, such property does not contribute to "anticipate[d] taxes and revenues," since it is not part of the assessed value used for purposes of taxation. 48 U.S.C. § 1423a.

Thus, the plain language of the Organic Act demonstrates that Congress intended to cap the issuance of bonds by the Guam government at the amount "necessary to anticipate taxes and revenues," but in no event greater than 10% of the property valuation used to levy taxes. 48 U.S.C. § 1423a. While Congress left the decision on how to structure the tax valuation system to the Guam Legislature, using one valuation system to calculate current taxes and another to calculate the debt cap is clearly inconsistent with the Organic Act.

B. Comparison Of The Guam Debt-Limitation Provision With Other Territorial Debt Caps Confirms The Erroneousness Of The Guam Supreme Court's Interpretation

The Guam Supreme Court refused to interpret the qualifier "tax" as setting Guam's public borrowing ceiling with reference to the assessed value of property on Guam in significant part because the debt-limitation provision in the Virgin Islands' Organic Act includes the word "assessed" rather than "tax" before "valuation." *See* Pet. App. 12a. The Virgin Islands' provision was enacted just a year before Guam's, and the court reasoned that Congress would not have used the word "assessed" in one organic act and "tax" in the other if it had intended both terms to mean "assessed." *Id.* As the decisions by state supreme courts interpreting unqualified debt-limitation provisions suggest, however, the presence of either qualifier, whether "tax" or "assessed," is more significant than the particular qualifier chosen in demonstrating that the legislature intended to restrict borrowing by tying it to the valuation of property used for purposes of taxation rather than full or appraised value. *See supra* pp. 27-28. But, in any event, the Guam Supreme Court's comparison of the Guam and Virgin Islands provisions ignores the evolution of the Virgin Islands Organic Act. Once that evolution is taken into account, Congress' use of different qualifiers in the two organic acts only demonstrates their equivalence, not their divergence.

In 1949 Congress amended the Virgin Islands Organic Act to authorize the Virgin Islands government, for certain purposes, to issue bonds "*Provided*, That no public indebtedness . . . shall be incurred in excess of 10 per centum of the aggregate assessed valuation of the taxable real property in . . . the Virgin Islands." 48 U.S.C. § 1403; *see id.* § 1574(b)(ii)(A). But unlike the Guam debt cap, the Virgin Islands debt-limitation proviso was enacted against the backdrop of a 1936 federal statute governing property taxation in the Virgin Islands that contained a separate provision mandating that "all taxes on real property in the Virgin Is-

lands shall be computed on the basis of the actual value of such property." 48 U.S.C. § 1401a; *see Bluebeard's Castle, Inc.* v. *Government of the V.I.*, 321 F.3d 394, 396 (3d Cir. 2003).[10] Because of this separate pre-existing federal requirement, if the debt-limitation provision added to the Virgin Islands Act in 1949 had defined the limitation with reference to "aggregate tax valuation," that might well have been understood to mean actual value. Thus, in the Virgin Islands Act, it was necessary for Congress to insert the word "assessed" before "valuation" in the debt-limitation proviso in order to make clear that the debt ceiling was tied to the assessed value of property, not its full, appraised value. When Congress enacted the Guam Organic Act the following year, there was no similar need to use the word "assessed." The adjective "tax" could be used to achieve the same result.

A comparison between the debt-limitation provisions applicable to the Virgin Islands and Guam therefore does not emphasize the distinction between "tax" and "assessed" valuation, but rather demonstrates that Congress has consistently tied operation of the territories' debt-limitation provisions to their current systems for calculating property valuation for tax purposes, however those systems are structured.[11] This approach avoids undue infringement on

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[10] The provision states that "[f]or the calendar year 1936 and for all succeeding years all taxes on real property in the Virgin Islands shall be computed on the basis of the actual value of such property and the rate in each municipality of such islands shall be the same for all real property subject to taxation in such municipality whether or not such property is in cultivation and regardless of the use to which such property is put." 48 U.S.C. § 1401a. Congress established this requirement because prior to this time land in the Virgin Islands had been appraised for tax purposes at different rates based on the particular use of the land. *Bluebeard's Castle*, 321 F.3d at 401. Uncultivated land in particular had been taxed at a low rate, thus creating a disincentive to development of much land on the islands. *Id.*

[11] Indeed, the bill containing the Virgin Islands debt-limitation provision had originally used the phrase "aggregate tax valuation." The House committee that considered the bill amended the phrase to use the word "assessed" in response to a recommendation from the Department of

local prerogatives when, as in Guam, there is no particular reason for Congress to dictate territorial tax structure, while ensuring that territories compare apples to apples by evaluating the impact of new debt issues according to the same tax base and same valuation system that generates their current revenues.

Whatever the language used, two purposes remain constant across the statutes. *First*, Congress has sought to ensure that territorial governments' borrowing is not excessive. As noted in a committee report on the first general statute designed to limit territorial borrowing, the 1886 Springer Act, ch. 818, 24 Stat. 170 (July 30, 1886) (codified before repeal at 48 U.S.C. §§ 1471 *et seq.*), several existing territorial governments had incurred large debts and many of their counties and towns had incurred further obligations "much beyond the limits of prudence." S. Rep. No. 49-1327, at 1 (1886); *see also id.* at 3-12 (providing territory-by-territory reports). Congress has consistently acted to keep territorial governments within those limits of fiscal responsibility. *Second*, in order to mark those limits, Congress has placed caps on territorial indebtedness tied to territorial governments' current taxing systems. The Guam Organic Act's debt-limitation provision, properly interpreted rather than read as the Guam Supreme Court read it, fits neatly into this pattern.

C. The Guam Supreme Court's Interpretation Undermines Congressional Purposes In Enacting Debt-Limitation Provisions

The Guam Supreme Court's interpretation flies in the face not only of the Guam Organic Act's language and the legislative history of other territorial debt-limitation provisions, but also of the core purpose of such statutes: to keep borrowing within limits tied to legislators' willingness to im-

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the Interior. But the change was characterized as simply a "perfecting amendment," *i.e.*, one not designed to change the statute's intended meaning. H.R. Rep. No. 81-682, at 2, 3 (1949).

pose taxes on the people who elect them. By fixing that link in Guam's federal constitution, the debt-limitation proviso ensures that the Guam Legislature cannot engage in levels of borrowing that would threaten the territorial government's solvency. It prevents the Legislature from excessively postponing the enactment of taxes needed to keep the government within its means and thrusting upon future taxpayers oppressive levels of taxation. And, perhaps most fundamentally, the debt-limitation proviso thereby ensures that the members of the Legislature (and the Governor) remain accountable to people who elect them and whom they serve.

In these respects, the Guam Organic Act's borrowing cap resembles its state constitutional and statutory counterparts. As state supreme courts have repeatedly recognized, those state law limitations are intended "to prevent the creation of excessive municipal debt and to protect taxpayers from the consequent oppression of burdensome, if not ruinous, taxation." *City of Hartford* v. *Kirley*, 493 N.W.2d 45, 51 (Wis. 1992); *see* 15 McQuillin, *The Law of Municipal Corporations* § 41:1 (3d ed. 2005) (constitutional debt limits established "as a limit to taxation and as a protection to taxpayers; to maintain municipal solvency" (footnote omitted)). They serve "to prevent municipalities from loading the future with obligations to pay for things the present desires, but cannot justly afford, and, in short, to establish the principle that, beyond the defined limits, they must pay as they go." *Keller* v. *City of Scranton*, 49 A. 781, 782 (Pa. 1901); *see City of Hartford*, 493 N.W.2d at 51 ("seeks to impose the burden of debt repayment upon those who create the obligations, not upon future generations"); 15 McQuillin, § 41:1 (limits are designed "to prevent legislators from making future taxpayers pay today's bills"). They aim to restrain "the lust of a greedy and overindulgent . . . government." *Allen* v. *Van Buren Township*, 184 N.E.2d 25, 31 (Ind. 1962) (internal quotation marks omitted).

The Guam Supreme Court acknowledged these purposes, *see* Pet. App. 6a-7a, yet went on to disregard them in

concluding that "[b]ecause . . . Congress clearly granted the legislature the power to impose taxes on the full market value of property" it must "interpret the debt limitation . . . consistently with the maximum grant of power to tax allowed by Congress," *id.* at 15a. Such a bootstrapping analysis ignores the fact that debt-limitation provisions are designed to ensure political accountability in addition to solvency. Refusal to use existing taxation powers is in fact one of the central dangers that such provisions are designed to guard against, since legislatures can otherwise avoid accountability for their current spending choices by using long-term debt to shift payment burdens to future taxpayers. The Guam Supreme Court's interpretation only encourages such behavior by focusing on the maximum authority to tax rather than the current assessed value of property available to generate anticipated taxes and revenues.

Indeed, it is precisely because debt-limitation provisions are intended to be tied to taxation activities that state courts have generally construed them to be based on "the assessed value of the property for taxation, rather than the actual value, where the two are different," absent use of the term "actual value" in the proviso. 15 McQuillin § 41:7. As state courts have recognized, this ensures that apples are compared to apples because "adopt[ing] one test for borrowing and a very different test for the purpose of taxation even though each is based upon and limited to the *assessed value* of the taxable property . . . is merely an obvious attempt to circumvent [debt-limitation requirements] and double or triple the borrowing capacity of [defendants]." *Breslow* v. *School Dist.*, 182 A.2d 501, 504-505 (Penn. 1962); *see also, e.g., Johanson*, 73 N.W.2d at 128 (debt-limitation provision based on "assessed value" construed to refer to valuation for purposes of taxation rather than market value).

The Guam Supreme Court's interpretation precisely illustrates the point, since it leaves the territorial Legislature free to engage in much greater borrowing—with the present assessment rate of 35%, nearly three times as much borrowing—as would the interpretation urged by petitioner. And

the Guam Supreme Court's reading leaves the level of borrowing untethered to the very "anticipated taxes and revenues" that are the basis for any debt issuance and to the Legislature's general willingness to impose taxes on voters. It is telling in this regard that when the Legislature sought post hoc to validate the 2003 bond issue in the face of petitioner's objections, it enacted in effect an advisory law expressing its view that the phrase "aggregate tax valuation" in the debt-limitation proviso should be interpreted to mean 100% of appraised value—rather than raising the assessment rate in a way that would have made it immediately accountable to current taxpayers. *See* Pet. App. 3a. In evading responsibility for changing the assessment rate, the Guam Legislature was engaging in just the sort of behavior the debt ceiling was intended to prevent.

The purpose of Guam's federal debt-limitation provision, in short, is "to benefit the taxpayer by restraining the government's propensity to incur debts and to saddle future generations of taxpayers with those debts," thereby "promot[ing] fiscal responsibility." *Guam Tel. Auth.*, 416 F. Supp. at 287. To the extent the terms of the proviso are ambiguous, they should be read to serve that core congressional goal. Instead, the Guam Supreme Court's interpretation subverts it. By ensuring that the limitation Congress has imposed on a territorial government is properly understood and scrupulously observed, this Court will promote both the fiscal soundness of Guam's government and the accountability of that government to the U.S. citizens it serves.

CONCLUSION

For the reasons given above, the judgment of the Guam Supreme Court should be reversed.

Respectfully submitted,

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